TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 787.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

SAM PELICAN AND NEW FOUNDERS, ALIAS SAM LICORICE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF [illegible]

FILED SEPTEMBER 30, 1918.

(28903)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 787.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

SAM PELICAN AND TONY PONTERRE, ALIAS ALEX LICOMTE.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON.

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1 Names and addresses of attorneys of record.

Oscar Cain, United States district attorney, Federal Building, Spokane, Washington, and E. J. Farley, Assistant United States district attorney, Federal Building, Spokane, Washington, attorneys for plaintiff in error.

Seabury Merritt, Old National Bank Building, Spokane, Washington, attorney for defendants in error.

1½ In the District Court of the United States, Eastern District of Washington, Northern Division.

THE UNITED STATES OF AMERICA, plaintiff, *vs.* SAM PALICAN AND TONY PONTERRE, alias Alex Licomte, defendants.	No. 1809. Indictment—Vio. Sec. 275, Penal Code. (Murder in first degree.) A true bill. (Signed) Geo. T. Crane, Foreman.

United States of America, Eastern District of Washington, Northern Division, United States District Court, September term, 1913.

The grand jurors of the United States, chosen, selected, and sworn in and for the Northern Division of the Eastern District of Washington, upon their oaths present:

That Sam Palican and Tony Ponterre, alias Alex Licomte, whose other or true names are to the grand jurors unknown, late of the county of Ferry, State of Washington, did heretofore, to wit, on or about the 30th day of August, A. D. one thousand nine hundred and thirteen, at a point about nine miles northwest of the town of Curlew, in the county of Ferry, State of Washington, in the Indian country, to wit, upon the allotment of one Agnes, an Indian, being lot three of section twenty-six, and lot nine of section thirty-five, in township forty north, of range thirty-two, E. W. M., in the Northern Division of the Eastern District of Washington, said land being then held in trust by the United States for the said Agnes for
2 the period of twenty-five years from the date of the trust patent, to wit, from the 6th day of December, A. D. 1909, unlawfully, feloniously, purposely, and with malice aforethought, with the intent to effect the death of one Edward Louie, commonly known as Ed. Louie, make an assault upon the person of said Edward Louie with deadly weapons, to wit, heavy blunt instruments, commonly called clubs, or other instruments the character of which is unknown to the grand jurors, then and there held in the hands of the said Sam Palican and Tony Ponterre, with which they did then and there unlawfully, feloniously, purposely, and with malice aforethought, and with the intent to effect the death of the said Edward Louie, strike, beat, and mortally wound the said Edward Louie, from

which mortal wounding the said Edward Louie then and there died, said Edward Louie being then a full-blood Indian, a member of the Colville Tribe of Indians, having received an allotment of land from the United States under the provisions of the act of Congress approved February 8, 1887, as amended by the act of February 28, 1891, and under the act of July 1, 1892, said land being then held in trust by the United States for the said Edward Louie for the period of twenty-five years from the date of said patent, to wit, from the 31st day of July, A. D. 1900; contrary to the form of the statutes in such case made and provided and against the peace and dignity of the United States.

(Signed) OSCAR CAIN,
United States District Attorney.
(Signed) EDWARD J. FARLEY,
Assistant U. S. Attorney.

(Endorsements:) Presented to the court by the foreman of the grand jury, in open court, in the presence of the grand jury, and filed in the United States District Court September 30, 1913. W. H. Hare, clerk.

3 In the District Court of the United States, Eastern District of Washington, Northern Division.

UNITED STATES OF AMERICA, *vs.* SAM PALICAN AND TONY PONTERRE, alias Alex Licomte.	No. 1809. Bench warrant.

UNITED STATES OF AMERICA,
Eastern District of Washington, ss:

To the marshal of the United States for the Eastern District of Washington, his deputies, or any or either of them, greeting:

Whereas at a District Court of the United States of America, for the Eastern District of Washington, begun and held at the city of Spokane, Washington, within and for the district aforesaid, on the 30th day of September, in the year of our Lord one thousand nine hundred and thirteen, the grand jurors in and for the said district brought into the said court a true bill of indictment against Sam Palican and Tony Ponterre, alias Alex Licomte, for the violation of section 275 of the Penal Code (murder in the first degree), as by the said indictment now remaining on file and of record in said court will more fully appear, to which indictment the said Sam Palican and Tony Ponterre, alias Alex Licomte, have not yet appeared or pleaded:

Now, therefore, you are hereby commanded, in the name of
4 the President of the United States of America, to apprehend the said Sam Palican and Tony Ponterre, alias Alex Licomte, and them bring before the said court, at the United States District Court room, in the city of Spokane, Washington, to answer the indictment aforesaid.

Witness the honorable Frank H. Rudkin, judge of the said District Court, and the seal thereof, at the city of Spokane, Washington, this 30th day of September, 1913.

Attest:

[SEAL.]

W. H. HARE, *Clerk*,
By FRANK C. NASH, *Deputy*.

(Signed) OSCAR CAIN, *U. S. Attorney*.

(Marshal's office.)

UNITED STATES OF AMERICA,
Eastern District of Washington, ss:

In obedience to the warrant I have the body of said Palican and Tony Ponterre, alias Alex Licomte, before the honorable United States District Court for the Eastern District of Washington this 3rd day of October, A. D. 1913.

(Signed) W. A. HALTEMAN,
United States Marshal,
By MAX ANDERSON, *Deputy*.

(Endorsements:) Bench warrant. Returned and filed in the U. S. District Court for the Eastern District of Washington, Northern Division, this 4th day of October, 1913. W. H. Hare, clerk.

5 In the District Court of the United States, Eastern District of Washington, Northern Division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
SAM PALICAN AND TONY PONTERRE, ALIAS Alex Licomte, defendants. } No. 1809. Demurrer.

The defendants demur to the indictment herein for the reason and upon the ground that it does not appear from the facts alleged and stated in said indictment that any crime has been committed upon or within territory in the Indian country, nor which is under the sole and exclusive jursidiction of the United States of America, and that by reason thereof the above-named court is without jurisdiction of said cause and said defendants.

Wherefore, defendants pray that said demurrer be sustained and that they be discharged from custody.

(Signed) SEABURY MERRITT,
Attorney for Defendants.

(Endorsements:) Service of the within demurrer by a true copy thereof is hereby admitted this ——— day of October, 1913. Attorneys for plaintiff. Demurrer to indictment. Filed in the U. S. District Court for the Eastern District of Washington, October 24, 1913. W. H. Hare, clerk.

6 In the District Court of the United States, Eastern District of Washington, Northern Division.

UNITED STATES OF AMERICA, complainant, *vs.* SAM PALICAN AND ALEC LICOMTE, defendants.	No. 1809. Stipulation.

It is hereby stipulated and agreed by and between the plaintiff and the defendants in the above-entitled action that lot 3 of section 26 and lot 9 of section 35, in township 40 north, of range 32 east, of the Willamette meridian, described in the indictment herein, was allotted to the Indian Agnes under the act of Congress entitled "An act to provide for the allotment of land in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and Territories over the Indians, and for other purposes," approved February 8, 1887, and the act in amendment and extension thereof approved February 28, 1891, entitled "An act to amend and further extend the benefits of the act approved February eighth, eighteen hundred and eighty-seven, entitled 'An act to provide for the allotment of land in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States over the Indians, and for other purposes,'" and is situate on that part of the Colville Indian Reservation opened to settlement and entry by the act of Congress of June 20, 1892, entitled "An act to provide for the opening of a part of the Colville Reservation,
7 in the State of Washington, and for other purposes," and that the foregoing facts may be considered by the court in connection with the indictment and as a part thereof in the consideration and disposition of the demurrer filed herein.

(Signed) OSCAR CAIN,
United States Attorney.
(Signed) E. J. FARLEY,
Assistant United States Attorney.
(Signed) SEABURY MERRITT,
Attorney for Defendants.

(Endorsements:) Stipulation. Filed in the U. S. District Court for the Eastern District of Washington, October 24, 1913. W. H. Hare, clerk, by Frank C. Nash, deputy.

8 In the District Court of the United States, Eastern District of Washington, Northern Division.

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* SAM PALICAN AND ALEC LECOMTE, DEFENDANTS.	No. 1809. Opinion.

Oscar Cain, U. S. atty.: E. J. Farley, asst. U. S. atty. Seabury Merritt, for defendants.

Rudkin, district judge: The defendants were indicted for the crime of murder committed against an Indian, "in the Indian country, to wit, upon the allotment of one Agnes, an Indian, being lot 3 of section twenty-six and lot nine of section thirty-five, in township forty north, of range thirty-two E., W. M., in the Northern Division of the Eastern District of Washington, said land being then held in trust by the United States for the said Agnes for the period of twenty-five years from the date of the trust patent, to wit, from the sixth day of December, A. D. 1909."

In aid or explanation of the indictment it is stipulated by the parties that the above lands were allotted to the Indian Agnes under the act of Congress entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations and to extend the protection of the laws of the United States and Territories over the Indians, and for other purposes," approved Febru-
9 ary 8, 1887 (24 Stat. L., 388), and the act in amendment and extension thereof, approved February 28, 1891 (26 Stat. L., 794), entitled "An act to amend and further extend the benefit of the act approved February eighth, eighteen hundred and eighty-seven, entitled 'An act to provide for the allotment of land in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and Territories over the Indians, and for other purposes,'" and is situate on that part of the Colville Indian Reservation opened to settlement and entry by the act of Congress of June 20, 1892 (27 Stat. L., 62), entitled "An act to provide for the opening of a part of the Colville Reservation, in the State of Washington, and for other purposes," and by the proclamation of the President of the United States of the 10th day of April, 1900.

A demurrer has been interposed to the indictment on the ground that this court is without jurisdiction. If the person against whom the crime was committed was an Indian within the meaning of the law and the crime was committed in the Indian country the case is clearly within the jurisdiction of this court under section 2145 of the Revised Statutes, which provides as follows:

"Except as to crimes the punishment of which is expressly provided for in this title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country."

Donelly v. United States, 228 U. S., 243.

The indictment in this case charges that the crime was committed against the person of an Indian and within the Indian country, but the charge that the crime was committed within the Indian country is a mere legal conclusion from the other facts set forth in the

indictment, namely, that it was committed within an Indian
10 allotment held in trust by the United States for the Indian Agnes for the period of twenty-five years and that the trust period has not expired.

Section 2145 forms a part of chapter 4 of Title XXVIII of the Revised Statutes relating to the government of the Indian country. That chapter contains thirty-one sections in all, nearly every one of which refers to the Indian country in some form, but neither there or elsewhere in the laws of the United States is there any attempt to define what is meant by the term Indian country. The first section of the Indian intercourse act of June 30, 1834, defined the Indian country as follows:

"That all that part of the United States west of the Mississippi River, and not within the States of Missouri and Louisiana or the Territory of Arkansas, and, also, that part of the United States east of the Mississippi River and not within any State to which the Indian title has not been extinguished, for the purposes of this act, be taken and be deemed to be the Indian country."

But that section has long since been repealed. The courts have held, however, that it may nevertheless be referred to "in connection with the provisions of its original context which remain in force, and may be considered in connection with the changes which have taken place in our situation, with a view of determining from time to time what must be regarded as Indian country where it is spoken of in the statutes."

Ex parte Crow Dog, 109 U. S., 556.

In Bates v. Clark (95 U. S., 204), it was said by Mr. Justice Miller:

"It follows from this that all the country described by the act of 1834 as Indian country remains Indian country so long as the Indians retain their original title to the soil, and ceases to be Indian country whenever they lose that title in the absence of any different provision by treaty or by act of Congress."

This language was quoted with approval in Ex parte Crow Dog and Donnelly v. United States, supra.

11 In United States v. Celestine (215 U. S., 278), and United States v. Donnelly, supra, it was held that a tract of land set apart from the public domain as an Indian reservation is Indian country within the meaning of the law. It is therefore established by these decisions that all that territory described in the act of 1834 as Indian country remains such so long and so long only as the Indians retain their original title to the soil, and that an Indian reservation set aside from the public domain for the use of the Indians by Executive order or otherwise is also Indian country so long as the reservation exists. Does a mere Indian allotment fall within the purview of these decisions? In my opinion it does

not. The Indians have lost their original title to the soil and it can not be said to be a reservation in any sense of the word. The mere fact that the Government holds title to the land in trust for the Indians confers no jurisdiction upon the Federal Government to punish crimes committed within the body of one of the organized counties of the State, nor can the mere selection of the land as an Indian allotment confer such jurisdiction. That part of the reservation where the crime was committed was thrown open to settlement and entry by Congress and by Executive order long before the commission of this crime and ceased to be an Indian reservation. The declaration in the first section that it was opened subject to the allotment of lands in severalty to the individual members of the tribe was inserted as a matter of protection to save and reserve the rights of the Indians to their allotments and not to reserve criminal jurisdiction over the lands in the Federal Government. It was, of course, conceded in argument that the United States has no jurisdiction over any part of the reservation thus
12 thrown open except such parts as are embraced in Indian allotments, and I am of opinion that the allotments stand upon the same footing as the rest. It was admitted in the course of the argument that there are six hundred and sixty Indian allotments on that part of the reservation thrown open, and this court is asked to go very far when it is asked to hold that it was the intention of the Congress to reserve jurisdiction in the Federal Government to punish crimes committed on six hundred and sixty separate and distinct parcels of land of from forty to eighty acres scattered throughout this broad territory. It seems to me that nothing but the most explicit language should induce a court to so extend the criminal jurisdiction of the Federal Government.

Ex parte Moore, 133 N. W., 817.

In the latter case the court said:

"Neither would such fact constitute such an allotment a little quasi Indian reservation off by itself, and also thereby creating the possibility of having a great number of half a mile square little Indian reservations, all under the exclusive jurisdiction of the United States, scattered and intermixed all around over a county or counties of a State. We can not believe that any such result was ever intended, but that all such allotments, so far and only as the commission of offenses are concerned, are subject to the general laws and jurisdiction of the State courts just the same as any other public domain within a State and not within the limits and boundaries of an Indian reservation."

For these reasons I am of opinion that the crime was committed without the jurisdiction of this court and within the sole and exclusive jurisdiction of the courts of the State of Washington. The demurrer will therefore be sustained and the prosecution dismissed,

but the defendants will be held for a period of not to exceed ten days to await the action of the State authorities. If demand is made for their custody within that time the United States marshal will surrender them to the proper authorities of the State, but if no
13 such demand is made they will be discharged from custody. Notice of this decision will be given forthwith by the marshal to the sheriff of the proper county. Let an order be entered accordingly.

(Endorsements:) Opinion sustaining demurrer to indictment and ordering discharge of defendants. Filed in the U. S. District Court for the Eastern District of Washington, October 24, 1913. W. H. Hare, clerk. By Frank C. Nash, deputy.

14 At a stated term, to wit, the September term, A. D. 1913, of the United States District Court for the Eastern District of Washington, Northern Division, held in the court room thereof, in the city and county of Spokane, in the State of Washington, on Friday, the twenty-fourth day of October, in the year of our Lord one thousand nine hundred and thirteen, the same being the forty-third day of the said regular September, 1913, term thereof. Present: The honorable Frank H. Rudkin, United States district judge for the Eastern District of Washington, presiding, the following proceedings were had in said case, to wit:

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* SAM PALICAN AND ALEX LICOMTE, defendants.	No. 1809. Order sustaining demurrer to indictment and ordering discharge of defendants.

Now, at this day, the court having rendered and filed its written opinion sustaining the demurrer of the defendants to the indictment herein returned against the defendants by the grand jury duly impaneled herein at this term of court, it is now ordered by the court that the demurrer of the said defendants to the said indictment be, and the same is, hereby sustained. It is further ordered by the court that the prosecution against said defendants be, and the same is hereby, dismissed, but it is ordered by the court that said defendants be held in custody of this court for a period not to exceed ten days from this date to await the action of the State authorities. If
15 demand is made by the State authorities for their custody within that time the United States marshal will surrender them to the proper authorities of the State, but if no such demand is made they will be discharged from custody, and the United States marshal is instructed by the court to give notice of this order to the sheriff of the proper county of the State of Washington.

(Signed) FRANK H. RUDKIN, *Judge.*

Entered in U. S. District Court Journal No. 4 at page 619.

16 In the District Court of the United States for the Eastern District of Washington, Northern Division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
SAM PELICAN AND TONY PONTERRE, ALIAS ALEX LICOMTE, defendants. } No. 1809.

ASSIGNMENT OF ERRORS.

Comes now the plaintiff above named, United States of America, and in connection with its petition for writ of error makes the following assignment of errors, which it avers occurred during the progress of this cause and upon which it will rely in its prosecution of the writ of error in the above-entitled cause to the Supreme Court of the United States:

I.

The court erred in holding that the District Court of the United States for the Eastern District of Washington is without jurisdiction of the offense charged in the indictment.

II.

The court erred in holding that the allotment described in the indictment as being the place where the crime was committed is not Indian country.

III.

The court erred in sustaining the demurrer to the indictment.

17 IV.

The court erred in not overruling the defendants' demurrer to the indictment and in not holding the defendants for trial.

Wherefore plaintiff prays that the aforesaid errors be corrected and that the order of the district court sustaining said demurer be set aside and that said district court be directed to hold said defendants for trial.

(Signed) OSCAR CAIN,
United States Attorney.

(Endorsements:) Assignment of errors. Personal service of the within assignment of errors is hereby acknowledged this 13th day of November, 1913. (Signed) Seabury Merritt, attorney for defendants. Filed in the U. S. District Court for the Eastern District of Washington November 13, 1913. W. H. Hare, clerk, by Frank C. Nash, deputy.

18 In the District Court of the United States for the Eastern District of Washington, Northern Division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
SAM PELICAN AND TONY PONTERRE, ALIAS ALEX LICOMTE, defendants. } No. 1809.

PETITION FOR WRIT OF ERROR.

The United States of America, plaintiff herein, feeling itself aggrieved by the order entered herein on the 24th day of October, A. D. 1913, sustaining the demurrer of the defendants to the indictment returned by the grand jury in the above-entitled cause, and in the record and proceedings had in said cause, complains that manifest error was committed to the prejudice of the said United States, all of which is more fully alleged and set forth in the assignment of errors filed herein in aid of this petition for a writ of error.

Wherefore, said plaintiff, United States of America, prays that a writ of error be issued in this behalf out of the Supreme Court of the United States, according to the provisions of the act of Congress of March 2, 1907 (34 Stats. L., 1246), for the correction of the errors complained of and that a transcript of the record, proceedings, and papers in this case, duly authenticated, may be sent to the said Supreme Court of the United States.

(Signed) OSCAR CAIN,
United States Attorney.

19 (Endorsements:) Petition for writ of error. Personal service of the within petition for writ of error is hereby acknowledged this 13th day of November, 1913. (Signed) Seabury Merritt, attorney for defendants. Filed in the U. S. District Court for the Eastern District of Washington November 13, 1913. W. H. Hare, clerk, by Frank C. Nash, deputy.

20 In the District Court of the United States for the Eastern District of Washington, Northern Division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
SAM PELICAN AND TONY PONTERRE, ALIAS ALEX LICOMTE, defendants. } No. 1809.

ORDER ALLOWING WRIT OF ERROR.

The plaintiff, United States of America, having this day filed its petition for a writ of error from the order entered herein on the

9th day of October, 1913, sustaining the demurrer interposed by defendants to the indictment returned against them by the grand jury at a regular session of the United States District Court for the Eastern District of Washington, to the Supreme Court of the United States, together with an assignment of errors specifying the matters complained of and of which it will complain, all within due time and in pursuance of the act of Congress of March 2, 1907 (34 Stat. L., 1246).

Now, therefore, it is ordered that a writ of error be, and hereby is, allowed.

Dated this 13th day of November, A. D. 1913.

(Signed) FRANK H. RUDKIN, *Judge.*

(Endorsements:) Order allowing writ of error. Filed in the U. S. District Court for the Eastern District of Washington November 13, 1913. W. H. Hare, clerk, by Frank C. Nash, deputy.

21 In the Supreme Court of the United States.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judge of the District Court of the United States for the Eastern District of Washington, greeting:

Because of the record and proceedings, as also in the rendition of the judgment and entering of the order sustaining the demurrer to the indictment found by the grand jury in the case pending before you between the United States of America, plaintiff, and Sam Pelican and Tony Ponterre, alias Alex Licomte, defendants, a manifest error hath happened, to the great damage of the plaintiff, United States of America, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment and order sustaining the demurrer to the indictment be therein given, that then, under your seal distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the 22d day of November, 1913, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

22 Witness the honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 13th day of November, in the year of our Lord one thousand nine hundred and

thirteen, and in the one hundred and thirty-eighth year of the Independence of the United States.

The above writ is hereby allowed.

(Signed) FRANK H. RUDKIN,
United States District Judge,
Eastern District of Washington.

Attest:

(Signed) W. H. HARE,
Clerk United States District Court
for the Eastern District of Washington.

(Endorsements:) Writ of error (lodged copy). Service of the within writ of error is hereby acknowledged this 13th day of November, 1913. (Signed) Seabury Merritt, attorney for defendants. Filed in the U. S. District Court for the Eastern District of Washington, November 13, 1913. W. H. Hare, clerk.

23 In the Supreme Court of the United States.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
SAM PELICAN AND TONY PONTERRE, ALIAS Alex Licomte, defendants in error.
} No. —. Citation.

The President of the United States of America, to Sam Pelican and Tony Ponteere, alias Alex Licomte, and to Seabury Merritt, esquire, your attorney, greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be held at Washington, in the District of Columbia, within thirty days from the date of this citation, pursuant to a writ of error filed in the office of the clerk of the District Court of the United States for the Eastern District of Washington, wherein the United States of America is plaintiff in error, and you, the said Sam Pelican and Tony Ponterre, alias Alex Licomte, are defendants in error, to show cause, if any there be, why the judgment and order rendered against the plaintiff in error sustaining defendants' demurrer to the indictment in said cause, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 13th day of November, 1913, and in the one hundred and thirty-eighth year of the Independence of the United States.

(Signed) FRANK H. RUDKIN,
United States District Judge.

Attest:

(Signed) W. H. HARE,
Clerk United States District Court,
Eastern District of Washington.

24 (Endorsements:) Citation (lodged copy). Service of the within citation is hereby acknowledged this 13th day of November, 1913. (Signed) Seabury Merritt, attorney for defendants. Filed in the U. S. District Court for the Eastern District of Washington, November 13, 1913. W. H. Hare, clerk.

25 In the District Court of the United States for the Eastern District of Washington, Northern Division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
SAM PELICAN AND TONY PONTERRE, alias Alex Licomte, defendants.
No. 1809. Praecipe.

To the clerk of the United States District Court for the Eastern District of Washington:

You will please prepare a transcript of the complete record in the above-entitled case to be filed in the office of the clerk of the Supreme Court of the United States under a writ of error to be perfected to said court, and include in said transcript the following:

Indictment;
Demurrer to indictment;
Stipulation as to situation and description of allotment;
Court's opinion sustaining demurrer to indictment;
Order sustaining demurrer;
Assignment of errors;
Petition for writ of error;
Order allowing writ of error;
Writ of error;
Citation;
Praecipe,

which include all of the papers, records, and other pleadings necessary to the hearing of the writ of error in the Supreme Court, and that no other records or pleadings than those above mentioned need be included by the clerk of said court in making up his return to said citation.

Dated this 13th day of November, A. D. 1913.

(Signed) OSCAR CAIN,
United States Attorney.

26 (Endorsements:) Praecipe for transcript of record. Service of the within praecipe is hereby acknowledged, this 13th day of November, 1913. (Signed) Seabury Merritt, attorney for defendants. Filed in U. S. District Court for the Eastern District of Washington, November 13, 1913. W. H. Hare, clerk. By Frank C. Nash, deputy.

26 In the District Court of the United States, Eastern District of Washington, Northern Division.

UNITED STATES OF AMERICA, plaintiff, *vs.* SAM PALICAN AND ALEX LICOMTE, defendants.	No. 1809. Clerk's certificate to transcript of record.

UNITED STATES OF AMERICA,
Eastern District of Washington, ss:

I, W. H. Hare, clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify that the foregoing typewritten pages, numbered from number 1 to number 25, inclusive, constitute and are a true, complete, and correct copy of the record, pleadings, indictment, and all proceedings had in said action as the same remain on file and of record in said District Court, and that the same which I transmit constitute my return to the annexed writ of error lodged and filed in my office on the 13th day of November, 1913. I also annex and transmit the original citation in said action.

I further certify that the cost of preparing and certifying to said record amounts to the sum of $15.70, and that the same will be included in my account against the United States for the quarter ending December 31, 1913.

27 In witness whereof, I have hereunto set my hand and affixed the seal of said District Court at the city of Spokane, in said Eastern District of Washington, Northern Division, in the Ninth Judicial Circuit, this 13th day of November, 1913, and the Independence of the United States of America, the one hundred and thirty-eighth.

[SEAL.]

W. H. HARE,
Clerk, U. S. District Court
for the Eastern District of Washington.

28 In the Supreme Court of the United States.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judge of the District Court of the United States for the Eastern District of Washington, greeting:

Because of the record and proceedings, as also in the rendition of the judgment and entering of the order sustaining the demurrer to the indictment found by the grand jury in the case pending before you between the United States of America, plaintiff, and Sam Pelican and Tony Ponterre, alias Alex Licomte, defendants, a manifest error hath happened to the great damage of the plaintiff, United

States of America, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment and order sustaining the demurrer to the indictment be therein given, that then under your seal distinctly and openly you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the 22nd day of November, 1913, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

29 Witness the honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 13th day of November, in the year of our Lord one thousand nine hundred and thirteen, and in the one hundred and thirty-eighth year of the Independence of the United States.

The above writ is hereby allowed:

FRANK H. RUDKIN,
United States District Judge, Eastern District of Washington.

Attest:
[SEAL.]

W. H. HARE,
Clerk United States District Court
for the Eastern District of Washington.

(Endorsement:) In the Supreme Court of the United States for the ——— of ———, United States of America vs. Sam Pelican and Tony Ponterre, alias Alex Licomte. Writ of error. Filed November 13th, 1913. W. H. Hare, clerk. By Frank C. Nash, deputy. Service of the within writ of error is hereby acknowledged this 13th day of November, A. D. 1913. Seabury Merritt, attorney for defendants.

31 In the Supreme Court of the United States.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
SAM PELICAN AND TONY PONTERRE, ALIAS ALEX LICOMTE, defendants in error.
} No. —. Citation.

The President of the United States of America to Sam Pelican and Tony Ponterre, alias Alex Licomte, and to Seabury Merritt, esquire, your attorney, greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States to be held at Washington, in the District of Columbia, within thirty days from the date of this citation, pursuant to a writ of error filed in the office of the clerk of

the District Court of the United States for the Eastern District of Washington, wherein the United States of America is plaintiff in error, and you, the said Sam Pelican and Tony Ponterre, alias Alex Licomte, are defendants in error, to show cause, if any there be, why the judgment and order rendered against the plaintiff in error sustaining defendants' demurrer to the indictment in said cause, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 13th day of November, 1913, and in the one hundred and thirty-eighth year of the Independence of the United States.

[SEAL.] FRANK H. RUDKIN,
United States District Judge.

Attest:
W. H. HARE,
Clerk United States District Court,
Eastern District of Washington.

(Endorsement:) In the Supreme Court of the United States for the ——— of ———. United States of America vs. Sam Pelican and Tony Ponterre, alias Alex Licomte. Citations. Filed November 13th, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy. Service of the within citation is hereby admitted this 13th day of November, 1913. Seabury Merritt, attorney for defendants.

(Endorsed on cover:) File No. 23938. E. Washington, D. C., U. S. Term No. 787. The United United States, plaintiff in error, vs. Sam Pelican and Tony Ponterre, alias Alex Licomte. Filed November 19th, 1913. File No. 23938.

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
SAM PELICAN AND TONY PONTERRE, ALIAS Alex Licomte. } No. 787.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON.

MOTION BY THE UNITED STATES TO ADVANCE.

The Solicitor General, on behalf of the United States, respectfully moves the court to advance the above-entitled cause for argument.

The indictment charged that the defendants murdered an Indian in the Indian country in violation of section 275 of the Criminal Code. The crime was committed upon the allotment of an Indian acquired under the acts of February 8, 1887, 24 Stat. 388, and February 28, 1891, 26 Stat. 794, held in trust by the United States and situate on that part of the Colville Indian Reservation opened to settlement and entry by the act of June 20, 1892, 27 Stat. 62.

The indictment was demurred to for want of jurisdiction and the court sustained the demurrer, holding that the allotment in question was not "Indian country" within the meaning of section 2145 of the Revised Statutes extending the general criminal laws of the United States to the Indian country.

The United States brings the case here under the Criminal Appeals Act of March 2, 1907, 34 Stat. 1246, for a review of this construction of Revised Statutes, section 2145.

Opposing counsel concur in this motion.

JOHN W. DAVIS,
Solicitor General.

DECEMBER, 1913.

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In the Supreme Court of the United States.

OCTOBER TERM, 1913.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
SAM PELICAN ET AL. } No. 787.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This writ of error was sued out by the United States as plaintiff direct to the District Court of the United States for the Eastern District of Washington to review a decision sustaining a demurrer to an indictment filed against the two defendants on September 30, 1913, and charging them with the murder on August 30, 1913, of Ed Louie, a full-blood Colville Indian, then an allottee of land held in trust for him by the United States, upon allotment made under the act of Congress of June 20, 1892 (27 Stat. 62). The crime is alleged to have been committed—

> at a point about nine miles Northwest of the town of Curlew in the County of Ferry, State of Washington, in the Indian Country,

> towit: Upon the allotment of one Agnes, an Indian, being Lot three of Section Twenty-six and Lot nine of Section Thirty-five, in Township Forty North, of Range Thirty-two, E. W. M., in the Northern Division of the Eastern District of Washington, said land being then held in trust by the United States for the said Agnes. (R. page 1 and 2.)

Matter of which the court would doubtless take judicial notice was spread upon the record by written stipulation as follows: That the legal subdivisions described as the Agnes allotment were allotted to her under the general allotment act of February 8, 1887 (24 Stat. 388), and the act of February 28, 1891 (26 Stat. 794), amendatory thereof, and were situate in that part of the Colville Indian Reservation opened to settlement and entry by act of June 20, 1892 (27 Stat. 62). (R. page 4.) (A similar stipulation in connection with a writ of error sued out by the United States from a decision on demurrer was regarded by the court in *U. S.* v. *Sutton,* (215 U. S. 292–293.)

The demurrer urged that it did not appear that—

> * * * any crime had been committed upon or within territory in the Indian country, nor which is under the sole or exclusive jurisdiction of the United States, and that by reason thereof the court was without jurisdiction.

The court's decision sustaining the demurrer is incorporated in the record. (R. pp. 5, 6, and 7.)

SPECIFICATION OF ERRORS RELIED ON.

I.

The court erred in holding that the District Court of the United States for the Eastern District of Washington is without jurisdiction of the offense charged in the indictment.

II.

The court erred in holding that the allotment described in the indictment as being the place where the crime was committed is not Indian country.

III.

The court erred in sustaining the demurrer to the indictment.

IV.

The court erred in not overruling the defendants' demurrer to the indictment and in not holding the defendants for trial.

ARGUMENT.

1. The right of the United States to prosecute this writ.

This is accorded whenever the decision is based "upon the invalidity or construction of the statute upon which the indictment is founded" (34 Stat. 1246). The indictment is based upon section 2145, Revised Statutes, providing that certain—

> * * * ~~the~~ general laws of the United States as to the punishment of crimes committed in any place within the sole and ex-

> clusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country—

and section 4339 (which is not repealed or affected by the Criminal Code of January 1, 1910), declaring that—

> * * * every person who commits murder * * * within any fort, arsenal, dockyard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States * * * shall suffer death.

The decision necessarily involved the preceding sections as applied to the facts charged.

> At the outset we are confronted with the contention that the decision is not based upon a construction of the statute. But to this we can not consent. The court could not have decided as it did, *that the acts charged are not within the condemnation of the statute, without first ascertaining what it does condemn, which, of course, involved its construction.* (*United States* v. *Patten,* 226 U. S. 535.)
>
> The question whether the indictment charges an offense against the laws of the United States involves the validity of the act of January 30, 1897, as applied to the facts stated, and therefore the case is one properly before us, under the act providing for writs of error in certain instances in criminal cases. (*United States* v. *Sutton,* 215 U. S. 294; see also *United States* v. *McBratney,* 104 U. S. 621, 622; *United States* v. *Keitel,* 211 U. S. 397, 398.)

2. Jurisdiction of the District Court.

The four specifications of error present a single question, viz, Did the District Court of the United States have jurisdiction of the crime of murder committed in August, 1913, on the "Agnes" allotment by a person not an Indian, upon an Indian allottee, whose allotment was then held in trust by the United States?

The Government ownership of the territory involved originated in exploration in 1792 and later, in settlement, and by treaty of February 22, 1819, with Spain. (Moore's Dig. Int. L., vol. 5, p. 720.) And the boundary controversy with Great Britain (affecting it) was settled by the treaty of June 15, 1846 (9 Stat. 869). These historic matters will be judicially noticed by this court.

Donnelly v. *United States,* 228 U. S. 259.

The Colville Reservation was set apart by Executive order of President Grant on July 2, 1872 (Exec. Ord., Ind. Resv., Ed. 1912, 194–195)—

> as a reservation for said Indians, and for such other Indians as the Department of the Interior may see fit to locate thereon—

and it embraced—

> The country bounded on the east and south by the Columbia River, on the west by the Okanogan River, and on the north by the British possessions.

The "said Indians" were—

> The following bands of Indians in Washington Territory, not parties to any treaty,

> viz: * * *. (Here were enumerated the members of the Methow, Okanogan, San Poel, Lake, Colville, Kalispel, Spokane, and Coeur d'Alene Indians, aggregating 4,200 persons.)

The language of the above-named order makes it plain, as was the fact, that the reservation was carved out of the "public domain." On July 2, 1892, after negotiations for a treaty (not ratified), the details of which are recited in *McFadden v. Mining Co.* (97 Fed. 674–675), Congress passed "An act to provide for the opening of a part of the Colville Reservation * * *," etc. (27 Stats. 63), which act recited that this reservation was created by Executive order dated July 2, 1872. Section 1 of this act declares:

> That *subject* to the *reservations* and *allotments* of lands in severalty to the individual members of the Indians of the Colville Reservation in the State of Washington *herein provided for,* all of the following described tract or portion of said Colville Reservation, namely (here followed boundary description covering one and a half million acres), be, and the same is hereby, vacated and restored to the public domain notwithstanding any Executive order or other proceeding whereby the same was set apart as a reservation for any Indian or bands of Indians; and the same shall be open to settlement and entry by the proclamation of the President of the United States and shall be disposed of under the general laws applicable to the

disposition of the public land in the State of Washington. (27 Stat. 62.)

Section 4 provided:

> That each and every Indian *now residing upon the portion* of the Colville Reservation hereby vacated and restored to the public domain * * * shall be entitled to *select from said vacated portion* eighty acres of land which shall be allotted to each Indian in severalty—

without restriction as to location, except that it should conform to legal subdivisions and that preference was given Indians having improvements as to selection of that particular tract. Allotment selections were to be made under rules prescribed by the Secretary of the Interior and not later than six months after the President's proclamation "opening the lands hereby vacated for settlement and entry."

It also provided that, *when selected,* the allotments should be held in trust and conveyed pursuant to the general allotment act of 1887 and its amendatory act of 1891, and finally, that such allotments should be subject to the laws of eminent domain of the State of Washington; and should, *when* conveyed in fee simple to the allottees or their heirs, be subject to taxation as other property in said State. The closing section of the act provides:

> * * * That nothing herein contained should be construed as recognizing title or ownership of said Indians to any part of

the said Colville Reservation whether that *hereby restored* to the *public domain* or that *still reserved* by the Government *for their use* or *occupancy*. (27 Stat. 64.)

By act approved February 20, 1896 (29 Stat. 9), entitled "An act to extend the mineral land laws of the United States to *lands embraced* in the *north* half of the Colville Indian Reservation * * *," Congress made those laws applicable *to* the *territory as bounded* in the act of July 2, 1892, *supra* (referring to such territory as "*all* lands embraced within the Colville Indian Reservation"). And in the title, as well as the body of the act, spoke of these lands as *still* (1896) within the boundaries of that reservation. And on March 6, 1896 (29 Stat. 44), Congress granted a railroad right of way "through the *Colville Indian Reservation,*" so-called, across lands, including, among others, the lands described in the act of July 2, 1892. On April 10, 1900, by Executive proclamation reciting compliance with all conditions precedent to its issuance (31 Stat. 1963), President McKinley nominated October 10, 1900, as the date for opening to settlement and entry (under "the terms of and subject to all the conditions, limitations, reservations, and restrictions contained" in said act of July 2, 1892) such lands, excepting among others the lands already allotted or which might be allotted prior to October 10, 1900. (The land schedule attached to the above proclamation does not disclose

the "Agnes" allotment, for the reason that it had not theretofore been selected.)

This indictment does not allege that the defendants were Indians. We must, therefore, assume they were not.

> As the indictment fails to charge that the crime was committed by an Indian, it necessarily follows if the court had jurisdiction only to punish such crimes the want of jurisdiction appears on the face of the record. (*Draper* v. *U. S.*, 164 U. S. 241.)

A like lack of averment was noticed in *Donnelly* v. *U. S.* (228 U. S. 252). Hence it is that upon the question of jurisdiction we must disregard the act of March 3, 1885 (23 Stat. 362–385), for that act only applies to crimes committed by Indians.

> The act of 1885 of itself provides for the punishment of crimes committed *by* Indians *only*. So far from impliedly repealing section 2145, Revised Statutes, it manifestly repeals in part the limitation that was imposed by section 2146 upon the effect of 2145. (*Donnelly* v. *U. S.*, 228 U. S. 270.)

It can not be urged here that, because the reservation was erected from public domain rather than lands previously held in tribal ownership, it was not "Indian country," for this court has held that contention invalid.

> It is contended for plaintiff in error that the term "Indian country" is confined to lands to which the Indians retain their original right of possession, and is not applicable

> to those set apart as an Indian reservation out of the public domain, and not previously occupied by the Indians.
>
> * * * And, in our judgment, nothing can more appropriately be deemed "Indian country," within the meaning of those provisions of the Revised Statutes that relate to the regulation of the Indians and the government of the Indian country, than a tract of land that, being a part of the public domain, is *lawfully* set apart as an Indian reservation. (*Donnelly* v. *U. S.*, 228 U. S. 268 and 269.)

That the Executive order constituted "a lawful setting apart as an Indian reservation" is conclusively established by the acts of Congress and the agreements with reference to this particular reservation, which are referred to in the case of *Starr* v. *Long Jim* (227 U. S. 615–617), also the act of June 21, 1892 (27 Stat. 62), and the act of February 20, 1896 (29 Stat. 9); and by applying thereto the following language of this court:

> Whatever doubts there might have been, if any, as to the validity of such Executive order, are put at rest by the act of Congress of February 8, 1887 (24 Stat. 388, c. 119, sec. 1), the first clause of which is "That in all cases where any tribe or band of Indians has been or shall hereafter be located upon any reservation created for their use, either by treaty stipulations or by virtue of an act of Congress or Executive order setting apart the same for their use, the President of the

> United States be, and he hereby is, authorized, whenever in his opinion any reservation, or any part thereof, of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon, in quantities, as follows."
>
> The necessary effect of this legislative recognition was to confirm the Executive order, and establish *beyond* challenge the *Indian title* to this reservation. (*In re Wilson*, 140 U. S. 576 and 577. See also *McFadden* v. *M. V. M. & M. Co.* 97 Fed. 673.)

It must be remembered, then, that the same single act of Congress provided for the admission of both Montana and Washington, and that the constitution of each new State contained a like "compact with the United States" as to jurisdiction over Indian lands, and that the *Draper* case (164 U. S. 240–247), involving the Montana constitutional compact, is distinguished in the *Donnelly* case in the following language:

> Section 2145, Revised Statutes, in connection with section 5339, plainly includes within its terms the offense of murder committed against the person of an Indian within an Indian reservation by a person not of Indian blood, but it is contended that the admission of California into the Union "on an equal footing with the original States," without any express reservation by Con-

gress of governmental jurisdiction over the public lands contained within her borders, conferred upon the State undivided authority to punish crimes committed upon those lands, even when set apart for an Indian reservation, excepting crimes committed by the Indians. Reference is made to the cases of *United States* v. *McBratney* (104 U. S. 621), and *Draper* v. *United States* (164 U. S. 240), where it was held, in effect, that the organization and admission of States qualified the former Federal jurisdiction over Indian country included therein by withdrawing from the United States and conferring upon the States the control of offenses committed by white people against whites, in the absence of some law or treaty to the contrary. In both cases, however, the question was reserved as to the effect of the admission of the State into the Union upon the Federal jurisdiction over crimes committed *by or against the Indians* themselves. (104 U. S. 624; 164 U. S. 247.) *Upon full consideration we are satisfied* that *offenses committed by or against* Indians *are not within the principle* of the McBratney and Draper cases. (*Donnelly* v. *U. S.*, 228 U. S. 271.)

Thus we see that every question in this case is foreclosed by that decision in favor of the Government's contention save the effect of the act of July 1 ~~29~~, 1892, *supra*, and the proceedings had thereunder. In other words, had the killing occurred on the land described in the year 1891 the jurisdiction

of the Federal district court to try the defendant for murder would stand favorably adjudicated by the decision of this court in the *Donnelly* case.

Two questions then remain:

(1) Did the murdered man (who was theretofore a full-blood Indian member of the Colville Tribe) cease to be an Indian because he had theretofore accepted an allotment which was then held in trust for him; and

(2) Had the "Agnes" allotment ceased to be a part of the reservation, and ceased to be Indian country?

1. Was Ed Louie an Indian?

The allotment under the act of June 20, 1892 (providing for proceedings after selection, pursuant to the act of 1887, as amended), did not deprive Louie of his character as an Indian.

> The act of 1887, which confers citizenship, clearly does not emancipate the Indians from all control, or abolish the reservations (*Eells* v. *Ross*, 12 C. C. A. 207, quoted in *U. S.* v. *Celestine*, 215 U. S. 287.)

In the last-named case this court decided (1) that the clause of section 6 of the general allotment act of 1887 giving the Indians the benefit of and making them "subject to the laws both civil and criminal of the State or Territory in which they may reside" only applied to allotments made under that particular act; and

(2) That the second clause of section 6, comprehending allotments made under the provisions of some other act of Congress, or treaty, merely gave the Indian privileges of citizenship, but did not make him subject to the benefits or burdens of State laws; and

(3) That the effect of the act of May 8, 1906 (34 Stat. 182), amending the act of 1887, was in the case of allotments made under the act of 1887 to continue the control over the Indian and postpone the time when the Indian allottee should become subject to State laws until the issuance of the final patent in fee at the expiration of the trust period.

> Notwithstanding the gift of citizenship, both the defendant and the murdered woman remained Indians by race, and the crime was committed by one Indian upon the person of another, and within the limits of a reservation. Bearing in mind the rule that the *legislation of Congress is to be construed in the interest of the Indian,* it may fairly be held that the statute does not contemplate a surrender of jurisdiction over an offense committed by one Indian upon the person of another Indian within the limits of a reservation; at any rate it can not be said to be clear that Congress intended by the mere grant of *citizenship* to *renounce entirely its jurisdiction over the individual members* of *this dependent race.* There is not in this case in terms a subjection of the individual Indian to the laws, both civil and criminal, of the State; no grant to him of the benefit

of those laws; *no denial of the personal jurisdiction of the United States.*

The act of May 8, 1906, c. 2348, 34 Stat. 182, extending to the expiration of the trust period the time when the allottees of the act of 1887 shall be subject to State laws, is worthy of note as suggesting that Congress, in granting full rights of citizenship to Indians, believed that it had been hasty. (*U. S.* v. *Celestine,* 215 U. S. 290–291.)

In the case at bar the "Agnes" allotment was not made under the act of 1887, but under the special act of June 21, 1892, though the rules prescribed by the former act were adopted as a procedure in the case of allotments already made. Moreover, final patent had not issued to Louie, but the title was held in trust by the United States. In any view of the matter Louie was not then entitled to the benefits of, nor subject to the laws of the State of Washington; but was an Indian, still under the protection of the Federal Government, and subject to its control. Therefore the crime was committed against an Indian within the meaning of the rule in the *Donnelly* case, *supra.*

2. Had the land embraced within the "Agnes" allotment ceased to be Indian country?

The disparaging reference in sections one and eight of the act to the previous Executive order creating the reservation cannot lessen the force of the latter nor the title or rights of the Indians in the lands, neither can they be affected by the declaration, in the closing section of the act, that it is not

to be construed as recognizing any title in the Indians; for, whatever Congress then said, we have seen that these Indians had as a matter of law and by force of the Executive order and earlier acts of Congress, referring to and recognizing the reservation, the very same right in the land as if it had been carved out of their own previous occupancy.

> The necessary effect of this legislative recognition was to confirm the Executive order, and establish beyond challenge the Indian title to this reservation. (*In re Wilson,* 140 U. S. 577.)

In a case involving this same Colville Reservation the Ninth Circuit Court of Appeals has said:

> There can be no doubt of the power of the President to reserve those lands of the United States for the use of the Indians. The effect of that executive order was the same as would have been a treaty with the Indians for the same purpose * * * etc. (*McFadden* v. *Mountain Boy Mining & Milling Co.,* 97 Fed. 670–673.)

So, while the court below asserts that the Indians have lost their original title, if the court means tribal rights anterior to the Executive order of 1872, there were none. But the title gained by the reservation created under that order was as good as one founded on anterior tribal occupancy, and such title is not extinguished by mere allotments while they are held in trust.

Because this allotment was a part of the Colville Reservation, and therefore " Indian country "

(at least before the passage of the act of July 2, 1892), jurisdiction in the District Court would have attached under section 2145, Revised Statutes, and would continue to attach after the passage of that act unless, as a result of the act or its operation, the land in the "Agnes" allotment had ceased to be Indian country. Allotments while held in trust, if selected from reservation lands, would not cease to be "Indian country."

> All the country described by the act of 1834 as Indian country remains Indian country as long as the Indians retain their original title to the soil, and ceases to be Indian country whenever they lose that title. * * * (*Bates* v. *Clark,* 95 U. S. 209.)
>
> Although the defendant had received a patent for the land within that reservation, and although the murdered woman was the owner of another tract within such limits, also patented, both tracts remained within the reservation *until Congress excluded them therefrom.* * * *
>
> And when Congress has once established a reservation allotted tracts included within it remain a part of the reservation until separated therefrom *by Congress.* (*U. S.* v. *Celestine,* 215 U. S. 284–285.)

Speaking of an allotment made under the general act of 1887 in what had been the Yakima Reservation, as to which it was stipulated—

> * * * that the trust limitation has not yet expired and the title to said allotment is

> still being held in trust by the Government, * * *

this court said:

> The limits of the Yakima Reservation were not changed by virtue of the allotments that are referred to in the stipulation of facts. The lands allotted were subject to restraint against alienation, and the title which was conferred by the allotments was subject to defeasance. (*U. S.* v. *Sutton*, 215 U. S. 295; see also *Monson* v. *Simonson*, No. 14, Oct. term, 1913, U. S. Supr. Ct.; *U. S.* v. *Gardner*, 189 Fed. 690.)

The boundaries of the reservation are not in expressed terms, declared to be altered by the act of July 2, 1892. If it have such an effect it must be by implication springing from the fact that the act vacates and restores to the public domain a very large area within the original outer boundaries; and from the fact that whatever land is affected by the vacation clause would be necessarily withdrawn from the reservation. The idea that new outer boundaries of the reservation were delimited by the act is opposed to the language used by Congress in the later act of February 20, 1896 (29 Stat. p. 9), applying the mineral laws, which act both in the title and in its body refers to the land described in section 1 of the act of July 2, 1892, as being still (in 1896) within the limits of the Colville Indian Reservation, and opposed by the act of March 6, 1896 (29 Stat. 44), granting the railroad right of way through the same lands.

Thus the question primarily turns on whether the act of July 1, 1892, accomplished a vacation and a restoration to the public domain of the whole of the north half of the reservation or only the portions thereof that should be unallotted and not reserved by the act.

For the contention that the effect of the act was to restore the whole area described by bounds in section 1 with an after privilege in the Indians to select allotments from the land as a part of the public domain, it may be urged that section 4 in providing that—

> * * * each and every Indian now residing upon the portion of the Colville Reservation, hereby restored to the public domain, shall be entitled to select from said vacated portion * * * etc.—

indicates that the selection was to be made from the land after vacation.

The Ninth Circuit Court of Appeals has decided against this contention, saying:

> The question in the case is whether or not the act of July 1, 1892, in and of itself operated to restore that portion of the Colville Indian Reservation described in its first section to the mass of public lands, so as to admit of the immediate entry thereon by the public, * * * etc. It is undisputed that the officers of the Land Department have uniformly held that the act did not have that effect. * * *

That Congress did not intend by the act of July 1, 1892, to open the portion of the Colville Indian Reservation thereby restored to the public domain to the operation of the mineral laws of the United States in advance of and without reference to the proclamation of the President therein provided for is, we think, quite clearly shown by its act of February 20, 1896, * * * etc.

Recurring to the act of July 1, 1892, we see no good reason to doubt that it was properly construed by the officers of the Land Department, and by Congress itself, as manifested by its act of February 20, 1896. It is true that by the first section of the act of July 1, 1892, that portion of the Colville Indian Reservation therein described was, *with certain limitations* and *exceptions* restored to the public domain, * * * etc.

Again recurring to the act of July 1, 1892, it is seen that the portion of the Colville Indian Reservation thereby restored to the public domain was expressly made subject to the reservations and allotments of land in severalty to the individual members of the Colville Tribe provided for in the act, and the restoration was also accompanied with the express statutory declaration that the portion restored " shall be opened to settlement and entry by the proclamation of the President of the United States, and shall be disposed of under the general laws applicable to the disposition of public lands in the State of Washington." From these pro-

visions it is plain, we think, that the " opening " to be effected by the President's proclamation was as broad as the " disposition " provided for by the same section and clause; that is to say, that the lands authorized by the act to be disposed of under the general laws applicable to the disposition of the public lands were the same lands, and none other, that the President was, by his proclamation, authorized to open to settlement and entry. * * *

Hence it cannot be true, we think, that the portion of the Colville Reservation restored to the public domain by the act of July 1, 1892, was any more open to the public in the exploration of minerals and the location of mining claims thereon, in advance of the proclamation of the President therein provided for, than it was to any other kind of entry, or settlement, or disposition. Such exploration, if generally carried on, might, and very probably would, have resulted in numerous locations, very likely interfering with the allotments to the Indians provided for by the act, and subject to which the restoration was made; to avoid which conflicts was one of the purposes of the provision authorizing the President to provide by proclamation for the opening to settlement, entry, and disposition of the land restored by the act to the public domain. * * * *McFadden* v. *Mountain View Min. & Mill. Co.*, 97 Fed. 677–680.)

For the contention that the effect of the act was not to vacate and restore to the public domain the whole of the area described, it may be urged—

(1) That the language of section 1 "* * * be, and the same is hereby, vacated and restored to the public domain, * * *" etc., was expressly made "* * * subject to the reservations and allotments of land in severalty hereby provided for, * * *" and the qualification last quoted preceded the vacating clause. It will be seen that the section did not declare in terms the vacation and restoration of the whole area, with a privilege afterward to be enjoyed of allotment selection. In other words, it was only a conditional vacation and restoration, and stated that the vacation was subordinated to certain reservations and allotments of land in the act elsewhere provided for. [We note that if the vacation and restoration was only of the portion remaining after excluding the reservations made by the act and the allotments made under its provisions, the effect would be to leave those Indians of the tribe who were to enjoy the allotments (they being only those Indians residing within the area described, or the north half) in the same situation as their fellows then residing upon the south half of the reservation in respect to their political and civil rights and their relation to the reservation, the tribe, and the courts; whereas to hold that the act vacated and restored to the public domain the whole area would be to distinguish the Indians living within that area from

the other members of the tribe who lived in the southern half.]

(2) That the word " reservations " referred to in the opening clause of section 1, *supra,* is necessarily related to the " Tonasket School " land and sites " of the sawmill, gristmill, and other mill property on the reservation," as to which it is expressly declared in section 6 of the act that they are—

> * * * hereby *reserved from the operation* of this act unless other lands are selected in lieu thereof.

The school land and the mill sites, then, though lying in the northern half, could not be vacated or restored to the public domain, but were plainly reserved from the operation of the vacation clause. To hold otherwise would make the reservation meaningless. This demonstrates that the vacation clause did not operate upon all the lands within the boundaries described in section 1, and also that the words " subject to " in the phrase " subject to the allotment of lands in severalty " were meant and intended, at least as to the school and mill land, to except them from the operation of the clause vacating and restoring to the public domain. If these words, " subject to," have that effect as to the one word " reservations" which they modify, must they not have a like effect as to " allotment of lands in severalty " which they also modify? And especially should this not be the rule of construction when, as we have seen, its effect would be to accom-

plish uniformity of political and civil rights as to all the Indians of the tribe; whereas to hold otherwise would be to make one rule for those in the northern and another for those of the tribe in the southern half of the original reservation; and further, when the former interpretation would secure a defeasance for tribal use in case an allottee died without heirs during the trust period, while the latter interpretation would result in a reversion to the public domain?

Again, if it was not intended to leave the allotted lands in their former status (but rather to restore them to the public domain and give to the Indians an after right of selection only as from the public domain) then the situation of the Indian corresponded to that of the white man who was given the right of settlement and entry under the public land laws; and so either these entries and settlements should have been included with "reservations and allotment in severalty" in the clause modified by the words "subject to," or the allotments should have been omitted therefrom. Plainly the inclusion of the allotments in the same category with the reservation, viz, the school and mill lands, was intentional and not accidental.

Moreover, the words "the same" in the closing clause of section 1, reading "* * * and the same shall be open to settlement and entry, * * *," etc., necessarily refer to the lands vacated and restored to the public domain, and necessarily related to all of such lands so vacated and

restored. And if the land to be allotted was a part of that vacated and restored, such construction would make it subject to settlement and entry by the whites and there would result a race between the Indian selector and the white entryman with no provision regulating priority. And if the restoration and vacation clause were here operative upon the whole of the area described, then the school and mill lands would also be subject to entry and settlement under the general land laws, which would produce an absurdity.

The phrase in the closing paragraph (8) of the act reading "* * * still *reserved* by the Government for their use and occupancy" will very naturally include the allotments when selected as well as the south half of the reservation; and if not so interpreted it would be limited to a part only of the lands actually used and occupied by the Indians, *i. e.*, to the south half of the reservation to the exclusion of the allotments though the latter are all actually used and occupied by the Indians. Giving it the inclusive meaning then the contrasted phrase in the same section, "* * * any part of said Colville Reservation, whether that hereby restored to the public domain or that still reserved by the Government, for their use or occupancy * * *" would harmonize with the partial restoration accomplished by section 1, and would make section 8 cover, as it manifestly was intended to, the whole original reservation; and the contrasted portions would be in harmony with section 1 and

every other part of the act, provided the phrase in section 4 "* * * shall be entitled to select from said vacated portion * * *" be regarded as merely a convenient brief mode of reference to the north half of the reservation for purposes of selection. The weight of the argument seems to favor the view that the effect of the clause "subject to the reservations and allotment in severalty herein provided for" was to except the school lands, the mill sites, and the allotments from the operation of the clause vacating and restoring to the public domain, and that the latter clause operated on the remainder only of the land within the described boundaries, and that all of that remainder was made subject to entry and settlement under the public-land laws. If such be the interpretation, it logically follows that the Indian title was not extinguished, and that as to such lands there was no vacation, and therefore they remained a part of the reservation and continued as Indian country.

The argument of inconvenience, dwelt on by the court below, and suggested *In re Munroe* (133 Northwestern, 817) cited in the court's opinion (R. p. 7), which seems formidable at first, becomes less so upon analysis. The suggestion is that the result of such an interpretation would be to make many little Indian reservations, isolated from each other, and from the remaining half of the original reservation, surrounded by and mixed through the counties of the State, over which small

areas the United States would exercise exclusive jurisdiction. We submit—

(1) That there would not necessarily be exclusive jurisdiction. This is manifested when we consider that in the case of the large original reservations, under the doctrine announced in the *Donnelly* case, jurisdiction would be exercised in the case of murders committed at the *same* point, in one instance (the killing of a white person by a white person), by the State court; and in the other instance (the killing of an Indian by a white person), by the Federal court. (*Donnelly* v. *U. S.* 228 U. S. 271.)

(2) The size of the area where the jurisdiction is to be exercised is immaterial provided the physical boundaries be definitely established. This is illustrated by the fact that the Federal courts exercised jurisdiction over such small areas as forts, magazines, arsenals, and dock yards (sec. 272, Criminal Code of January 1, 1910), and also in the case of foreign embassies and consular buildings.

(3) This court in cases involving statutes prohibiting the introduction or sale of liquor on lands formerly a part of Indian reservations has held that if jurisdiction be reserved (even though town sites have been entered, and though the lots have been sold to individuals and full jurisdiction otherwise has attached in the State tribunals) the Federal courts will punish a crime against the Federal laws when committed upon a *single isolated lot*

(*Dick* v. *U. S.*, 208 U. S. 351; *U. S.* v. *43 gallons whiskey*, 93 U. S. 193, 195, 197); and as we have seen, has similarly declared in respect to areas held under allotment within the boundaries of reservations. (*U. S.* v. *Sutton*, 215 U. S. 295.)

(4) Section 2146 of the Revised Statutes expressly recognizes jurisdiction in each, the Indian tribe and the Federal Government, at the same place.

(5) The case of Starr against Long Jim represents allotments each a mile square, and in the case of "Long Jim" himself deals with a patent *in fee* to this Indian in connection with the very Colville Reservation granted without restriction of alienation or other condition (save the beneficial one of exemption from State taxation). And because the allotment so patented was not made under the act of 1887, while Long Jim became a citizen with the privileges thereof he remained (even after such final patent) an Indian and a ward of the Government. (*Starr* v. *Long Jim*, 227 U. S. 621.) If would seem, on principle, that the control of the Indian, so long as he is in a state of tutelage, should carry with it the corresponding right and power in Congress to protect him. If so, Congress had the power to expressly reserve in the act of July 21, 1892, the right in the Federal courts to punish the crime of murder, committed by or against an Indian anywhere on the north half of the reservation, described therein; and the exercise of that jurisdic-

tion would not be impaired by the fact that the places to which it attached were individually small and isolated. The serious question here is not whether the power of Congress is affected by the size of the area within which that power is to be exercised, but whether, though having the power it has, it has provided for its exercise by reserving the jurisdiction. Section 2145, *supra*, limits the jurisdiction to "Indian country." The act of March 3, 1885, before the court in the Celestine case, gave a broader jurisdiction in that it reached any Indian reservation in the case of a murder by an Indian (which, of course, is not our case here). Speaking of the meaning of the word "reservation," the Supreme Court said:

> But the word "reservation" has a different meaning, for while the body of land described in the section quoted as Indian country was a reservation, yet a reservation is not necessarily "Indian country." The word is used in the land law to describe *any body of land, large or small,* which Congress has reserved from sale for any purpose. (*U. S.* v. *Celestine,* 215 U. S. 285.)

It is true also that the lands meant for use and occupancy of the Indians in the act of July 21, 1892, are spoken of in section 8 as "reserved," and they certainly are reserved from sale even by the Indian allottee himself during the trust period with the possibility of defeasance. So we might fairly argue that even if there was a vacation and restoration to the public domain of the whole north

half of this reservation by the act of June 21, 1892, still there was such a reservation providing for allotments as would bring it within the meaning of that term as used in the act of March 3, 1885, and constitute each allotment a reservation. The difficulty that we encounter in connection with that argument would be that in that event jurisdiction under the act of March 3, 1885, would only attach in the Federal courts as to crimes committed by an Indian. It would seem, therefore, that to maintain the jurisdiction of the court below we must determine that the "Agnes" allotment, because excepted from the operation of the clause vacating and restoring to the public domain, remained during the trust period a part of the "Indian country" which had existed prior to that act and in which it had been included, and that the Indian title theretofore existing had not been extinguished by any restoration to the public domain before the allotment selection.

> These Indians are yet wards of the Nation, in a condition of pupilage or dependency, and have not been discharged from that condition. They occupy these lands with the consent and authority of the United States, and the holding of them by the United States, under the act of 1887 and the agreement of 1889, ratified by the act of 1891, is part of the national policy by which the Indians are to be maintained, as well as prepared for assuming the habits of civilized

> life, and ultimately the privileges of citizenship. (*U. S.* v. *Rickert*, 188 U. S. 432, quoted in *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 312.)

The foundation of the jurisdiction being the dependency of the Indian, his pupilage, the control of Congress over him, and the obligation of Congress because thereof to care for him, it is apparent that the Indian has no less need for the protecting aid of the Federal laws and courts when living on the "Agnes" allotment than when living on the south half of the reservation; nor has he any less need after having selected an allotment than before; nor any less need whether his allotment be within a solid body of allotments bordering directly on the south half of the reservation or be isolated from the south half and other allotments; nor any less need if his allotment be isolated than if, together with the other allotments as selected, it should absorb the whole north half of the reservation, thereby making the allotted portion plus the south half comprise the whole original reservation as it stood before the act. So far as size of area and location of area is concerned, therefore, this, on principle, should have no effect upon the question presented.

We submit then—

(1) That Ed Louie was an Indian, a ward of the Government, not emancipated or subject to the operation of the State laws.

(2) That the Colville Indian Reservation was Indian country, and as such the Federal courts could

punish for murder committed against an Indian within its borders prior to the act of July 20, 1892.

(3) That the effect of that act was not to restore to the public domain or vacate from the reservation the Agnes allotment any more than the Tonasket school land or mill lands, but that the Agnes allotment remained and still is Indian country within section 2145, and that therefore the court below had jurisdiction of the defendants.

CONCLUSION.

We submit that the judgment of the court below should be reversed with directions to overrule the demurrer and proceed with the case.

WILLIAM WALLACE, JR.,
Assistant Attorney General.

DECEMBER, 1913.

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In the Supreme Court of the United States.

OCTOBER TERM, 1913.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
SAM PELICAN ET AL. } No. 787.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON.

CORRECTION MEMORANDUM FOR THE UNITED STATES.

In the brief for the Government filed in this court (p. 8, foot, and p. 9, top) is found the following statement:

> The land schedule attached to the above proclamation does not disclose the Agnes allotment for the reason that it had not theretofore been selected.

(The proclamation referred to is the proclamation of President McKinley, made April 10, 1900, pursuant to the act of July 1, 1892, and providing for throwing the land subject to settlement open to settlement and entry after October 10, 1900.)

The above statement is apparently true; but is really erroneous, and in this manner. The indict-

ment uses description of the approved public survey under which the allotment was patented in 1909, viz:

> Lot 3 of section 26 and lot 9 of section 35 in township 40 north, range 32 E. W. M. (east of Willamette Meridian).

This description does not *in terms* appear, nor are any allottees named, in the schedule.

It was first so described in the public survey made over the land in 1907. The allotments themselves were made under a previous survey made by the Secretary of the Interior at the time of the selection of the allotments, under authority granted by the act of July 1, 1898 (30 Stat., 571), and which is recited in President McKinley's proclamation (31 Stat., 1964, foot). The description as given in the survey made by the Secretary of the Interior some time between July 1, 1898, and December 26, 1899, of this particular allotment was as follows:

> The west half of the northwest quarter of the northeast quarter of the northwest quarter of section 35; all of the northeast quarter of the northwest quarter of the northwest quarter lying east of Kettle River; all of southwest quarter of southwest quarter lying east of Kettle River; the west half of the southeast quarter of the northwest quarter of the southwest quarter; and all of the southwest quarter of the northwest quarter of the southwest quarter, lying east of Kettle River in section 26 of Township 40 north, Range 32 E. W. M.

The area in the Secretary's survey was 44 acres. The area in the survey that resulted in the indictment

description was 29.60 acres. The latter is contained wholly within the former, the difference in acreage being represented by the river bed.

Between *July 1, 1898*, and December 26, 1899, this allotment as No. 65 was made by Special Allotting Agent Casson to "Agnes" (as an Indian residing and having improvements on this very land on July 1, 1892), and made, under the provision of the act of July 1, 1892 (27 Stat., 62) and July 1, 1898 (30 Stat., 593), of land within the area described in section 1 of the first-named act.

On January 26, 1900, this allotment with 117 others, approved by the Commissioner of the General Land Office, was submitted by the latter to the Secretary of the Interior, who on January 30, 1900, approved them all and ordered them "to be *respected when the public survey shall be extended over said allotments.*"

All these facts as to the land and its description appear in a certified copy of a schedule of allotments and in a corrected schedule (the latter made March 20, 1909, to conform to "approved public surveys made in 1907"), which copies, duly certified by the Acting Commissioner of the General Land Office, together with two plats illustrating the locus in quo, the Government has caused to be filed in this cause, with the clerk of this court.

The Secretary's survey description was necessarily used in the schedule attached to the proclamation of President McKinley (Procl. No. 12, 31 Stat., 1963, 1973) as that proclamation was made April 10, 1900,

or seven years *before* the public survey was extended over the allotment. Because there was nothing in the record in this case to relate the allotment survey description to the indictment description and the latter was not in fact contained in the schedule, the statement was accordingly made as above in the brief. The allotment description will be found in the proclamation schedule (31 Stat., 1973, top) save that by oversight "section 35" was omitted in the description of the 6.61 acres which is the equivalent of lot 9. As, however, in every case in the schedule the townships follow one another in sequence by increasing township numbers, and as the proclamation reserved each section numbered 36 for school purposes, and as the last preceding section in this case was 34, the omitted section number must have been section 35, as is apparent on the face of the schedule itself. The history of these surveys in part is found in the proclamation itself (31 Stat., 1964).

This court will take judicial notice of the records of the executive departments of the Government and will consult them for information.

> *Jones* v. *U. S.*, 137 U. S., 202, 216; *Knight* v. *U. S. Land Ass'n*, 142 U. S., 161, 169; *Underhill* v. *Hernandez*, 168 U. S., 250, 253; *Tucker* v. *Alexandroff*, 183 U. S., 424, 467.
>
> The surveys of the public lands are made pursuant to statute and are proper subjects of judicial notice. Jones on Evidence (2d ed.), section 127, and cases cited.

4 Wigmore on Evidence, sec. 2575 and cases in note 1.

Atwater v. *Schenk*, 9 Wis., 160; *Murphy* v. *Hendricks*, 57 Ind., 593, 594; *Quinn* v. *Champagne*, 37 N. W., 451; *Rogers* v. *Cady*, 38 Pac., 81.

It has been judicially noticed that given lands are within an Indian reservation. *French* v. *Lancaster*, 2 Dak., 346 (cited in Jones on Evidence, *supra*, sec. 127, note 43).

The allotment survey was made under authority of a public statute, and the maps at the Government Land Office show that survey as well as the public survey of the land embraced with the Agnes allotment, No. 65. These records of the Interior Department therefore tell the whole story to this court.

THE RESULT OF THIS CORRECTION.

It now appears that the Agnes allotment was made under the act of July 1, 1892, prior to December 26, 1899, and *before* the presidential proclamation providing for opening the land to settlement and entry. The schedule is headed—

> Schedule of lands allotted to the Indians in restored portion of Colville Reservation, Washington, and *withheld from settlement and entry by proclamation of the President, dated April 10, 1900.* (31 Stat., 1966.)

The proclamation itself declares—

> * * * that all of said lands hereinbefore described, restored by the said act of July 1,

> 1892, will, at and after * * * the 10th day of October, 1900, *and not before*, be open to settlement and entry under the terms of and subject to all the conditions, limitations, reservations, and restrictions contained in the statutes above specified, and the laws of the United States, applicable thereto, *saving and excepting such tracts as have been or may be allotted to or reserved or selected for the Indians, or other purposes, under the laws herein referred to.* (31 Stat., 1965.)

Therefore, not only was this allotment excepted under section one from the operation of the clause vacating and restoring to the public domain as argued in the brief; *but it was also specifically excepted by the President from those lands proclaimed as intended to be opened for settlement after October 10, 1900.* The latter feature, of course, could not be and was not urged upon this court in the brief because of the error induced by the change of description of the land embraced in the allotment.

WILLIAM WALLACE, JR.,
Assistant Attorney General.

JANUARY, 1914.

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